

**In the High Court of Judicature at Hyderabad
for the State of Telangana and the State of Andhra Pradesh**

ITTA No.251 of 2005

Between:

**The Asst. Commissioner of Income Tax,
Andhra Pradesh – IV,
Hyderabad**

... Appellant

and

**Sri KCKA.Gupta,
H.No.3-6-145/9,
Himayatnagar, Hyderabad**

...Respondent

Date of Judgment Pronounced: 03-01-2018

Submitted for Approval:

**The Hon'ble Sri Justice C.V.Nagarjuna Reddy
and**

The Hon'ble Sri Justice T.Amarnath Goud

- | | |
|--|--------|
| 1. Whether Reporters of Local newspapers may be allowed to see the judgments ? | Yes/No |
| 2. Whether the copies of judgment may be marked to Law Reporters/Journals | Yes/No |
| 3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment ? | Yes/No |

(C.V.Nagarjuna Reddy, J)

(T.Amarnath Goud, J)

* The Hon'ble Sri Justice C.V.Nagarjuna Reddy
and
The Hon'ble Sri Justice Gudiseva Shyam Prasad
+ ITTA.No.251 of 2005
% Dated 03.01.2018

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...Respondent

! Counsel for the Appellant: Mr.J.V.Prasad

^ Counsel for the respondent: Mr.C.P.Ramaswami

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? Cases cited:

2000 Law Suit (SC) 305 = 2000 (243) ITR 83
2007 Law Suit (SC) 1524 = 2007 (295) ITR 282
Referred Case No.18 of 2001, Dated: 22-12-2017
(2007) 295 ITR 282 (SC)
(2012) 341 ITR 537 (Delhi)
(2011) 332 ITR 167 (Delhi)
(1993) 203 ITR 108 (Bom.)
(2003) 259 ITR 502 (Guj.)

The Hon'ble Sri Justice C.V.Nagarjuna Reddy

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ITTA.No.251 of 2005

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....Appellant

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....Respondent

Counsel for the Appellant:

Mr.JV.Prasad

Counsel for the respondent:

Mr.CP.Ramaswami

The Court made the following:

Judgment: (per Hon'ble Sri Justice C.V.Nagarjuna Reddy)

This Appeal filed by the Revenue raises the following substantial questions of law:

- “1. Whether on the facts and in the circumstances of the case the Tribunal is correct in setting aside the order of the Commissioner of Income Tax passed u/s. 263 of the I.T.Act ?
2. Whether on the facts and in the circumstances of the case, the Tribunal is correct in upholding the order of the assessing officer estimating the profit at certain percentage of unaccounted sales as against the entire undisclosed turnover which was unaccounted ?”

The facts leading to filing of this Appeal are briefly set out hereunder:

The respondent- assessee is the Chairman of M/s.Kwality Electronic Industries, Hyderabad, which has a group of Companies engaged in the manufacture and sale of automobile lamps, liquid electronic diodes, display units, two wheeler panel displays and railway signal lamps, apart from carrying on the business of amusement park as well as construction. A search and seizure operation was conducted against this group of Companies under Section 132 of the Income Tax Act, 1961 (for short ‘the Act’), on 24-10-1997.

At the time of search, the assessee admitted an undisclosed income of Rs.135 lakhs under Section 132(4) of the Act. Subsequently, he has enhanced it to Rs.1,43,21,000/-, which was later scaled down to Rs.1,41,02,000/- for the entire group. The Assessing Officer (AO), in the block assessment proceedings for the block period 01-04-1987 to 24-10-1997, accepted the returns filed by the assessee. Subsequently, the internal Audit Wing of the Department raised certain audit objections on the completed assessments. Based on those objections, the Commissioner of Income Tax – 3 and the Commissioner of Income Tax - 4 issued show cause notices to three of this group Companies under Section 263 of the Act. The AO has accepted the returns of the assessee in general and also in respect of the unrecorded sales and the percentage of unrecorded receipts liable to be brought to tax as undisclosed income. However, both the Commissioners have set aside the orders of the AO. Feeling aggrieved by those orders, all the three assesseees including the respondent herein have filed separate appeals. All the three appeals were allowed by the Income Tax Appellate Tribunal, Hyderabad, Bench B. The Revenue has filed the present Appeal to the extent it pertains to IT(SS) A.

No.101/Hyd/2002 relating to the respondent- assessee for the block period 1988-89 to 1998-99.

At the hearing, Mr.J.V.Prasad, learned Senior Standing Counsel for Income Tax, submitted that though a decision was taken to file Appeals against the Common Order pertaining to the two other group companies also, the details as to, whether they were filed, and if so, they have been disposed of or not, are not available.

Be that as it may, the learned Standing Counsel has strenuously submitted that the Tribunal has committed a serious error in setting aside the order of the Commissioner. He has taken us through the order of the Commissioner and submitted that the issue *viz.*, acceptance of returns filed by the respondent -assessee showing Rs.36 lakhs as expenditure out of the turnover sales of Rs.40 lakhs and accepting only Rs.4 lakhs as taxable income was erroneous and that the Commissioner has rendered a clear finding that the AO ought not to have taken the returns of the assessee on its face value without holding proper enquiry as to the correctness or otherwise of his claim of expenditure.

Opposing the above submission, Dr.C.P.Ramaswamy, learned Counsel for the respondent- assessee, submitted that the Commissioner has far too exceeded the jurisdiction vested in him under Section 263 of the Act by interfering with the order of the AO. He has further submitted that in order to exercise the jurisdiction under Section 263 of the Act, twin requirements need to be satisfied; *Firstly*, that the order of the AO must be erroneous and *Secondly*, that it is prejudicial to the interests of the Revenue. He has relied upon the judgments of the Supreme Court in **Malabar Industrial Co. Ltd., vs. Commissioner of Income Tax, Kerala**¹ and **CIT vs. Max India Ltd.**,² to draw support to his submissions.

We have carefully considered the respective submissions of the learned Counsel for the parties with reference to the record.

The law on the scope of jurisdiction of the Commissioner under Section 263 of the Act is well

¹ 2000 LawSuit (SC) 305 = 2000 (243) ITR 83

² 2007 LawSuit (SC) 1524 = 2007 (295) ITR 282

crystallized. In **Malabar Industrial Co. Ltd.**, (1 supra), the Supreme Court held as under:

“There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.”

This Court, speaking through one of us (CVNR, J), has discussed the relevant case law in **Commissioner of Income Tax, Visakhapatnam, vs. M/s.V.Dhana Reddy & Co., Visakhapatnam**³ and held as under:

“11.The scope of Section 263 of the Act is the subject matter of a slew of judicial pronouncements. In *Malabar Industrial Co. Ltd.* (2 supra), the Supreme Court held that while exercising jurisdiction *suo motu* under Section 263 of the Act, the Commissioner has to be satisfied with two conditions, namely, (i) that the Order of the AO sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the revenue. That if either of the two conditions is absent, the Commissioner cannot exercise his jurisdiction under the said provision. The Supreme Court further held that Section 263 of the Act cannot be invoked to correct each and every type of mistake or error committed by the

³ Referred Case No.18 of 2001, Dated: 22-12-2017

AO unless such mistake leads to an erroneous order causing prejudice to the interests of the Revenue. The Supreme Court held that an incorrect assessment of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. It has further held that the order passed without applying the principles of natural justice or without application of mind also falls in the same category of erroneous orders. Dealing with the phrase “prejudicial to the interests of the Revenue”, the Supreme Court held that it is not an expression of art and that understood in its ordinary meaning it is of wide import and is not confined to mere loss of tax. That if due to an erroneous order of the Income Tax Officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue, and that this phrase has to be read in conjunction with an erroneous order passed by the Assessing Officer.

12. In *C.I.T. v. Max India Ltd.*⁴ the Supreme Court held that when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income Tax Officer is unsustainable in law.

13. In *C.I.T. v. Vikas Polymers*⁵ the Delhi High Court held that the power of *suo motu* revision exercisable by the Commissioner under Section 263 of the Act is supervisory in nature and that if the Income Tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as “erroneous” by the Commissioner

⁴ [2007] 295 ITR 282 (SC)

⁵ [2012] 341 ITR 537 (Delhi)

simply because, according to him, the order should have been written differently or more elaborately, that the section does not visualize the substitution of the judgment of the Commissioner for that of the Income Tax Officer, who passed the order unless the decision is not in accordance with law.

14.In *C.I.T. v. Sunbeam Auto Ltd.*⁶ the Delhi High Court held that if there was an enquiry, even if it is inadequate that would not by itself give occasion to the Commissioner to pass orders under Section 263 merely because he has a different opinion in the matter, that it is only in cases of lack of inquiry that such a course of action would be open.

15.In *C.I.T. v. Gabriel India Ltd.*⁷ the Bombay High Court held that the conclusion of the Commissioner that an order is erroneous must be based on material on record of the proceedings called for by him and that if there is no such material on record, it can be said that the very initiation of proceedings by him would be illegal and without jurisdiction. It has further held that the Commissioner cannot initiate proceedings with a view to start fishing and roving inquiries in matters or orders which are already concluded and that the Department cannot be permitted to begin fresh litigation because of new views they entertain on facts or new versions which they present as to what should be the inference or proper inference either of the facts disclosed or the weight of the circumstance and that if this is permitted, litigation would have no end except when legal ingenuity is exhausted.

16.In *Kwality Steel Suppliers Complex* (1 supra) the Supreme Court after referring to the judgment of the Gujarat High

⁶ [2011] 332 ITR 167 (Delhi)

⁷ [1993] 203 ITR 108 (Bom.)

Court in *C.I.T. v. Arvind Jewellers*⁸, reiterating the principle that Section 263 of the Act cannot be invoked to correct each and every type of mistake or error committed by the AO, further held that the order of the AO cannot be termed as prejudicial, simply because he has adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the AO has taken one view with which the Commissioner did not agree.

17. On an exhaustive consideration of the case law, a Division Bench of this Court in *Spectra Shares and Scrips Pvt. Ltd.* (4 supra) summarized the legal position regarding the scope of jurisdiction of the Commissioner under Section 263 of the Act, as under:

a) The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent - if the order of the Income Tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but it is prejudicial to the Revenue - recourse cannot be had to Sec. 263 (1) of the Act.

b) Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue: or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law.

c) To invoke the suo motu revisional powers to reopen a concluded assessment under Sec. 263, the Commissioner must give reasons; that a bare reiteration by him that the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, will not suffice; that the reasons must be such as to show that the enhancement or modification of the assessment or cancellation of the assessment or directions issued for a fresh assessment were called for, and must irresistibly lead to the conclusion that the order of the Income Tax Officer was not only erroneous but was prejudicial to the interests of the Revenue. Thus, while the Income Tax Officer is not called upon to write an elaborate judgment giving detailed reasons in respect of each and every disallowance, deduction, etc., it is incumbent upon the

⁸ [2003] 259 ITR 502 (Guj.)

Commissioner not to exercise his suo motu revisional powers unless supported by adequate reasons for doing so; that if a query is raised during the course of the scrutiny by the Assessing Officer, which was answered to the satisfaction of the Assessing Officer, but neither the query nor the answer were reflected in the assessment order, this would not by itself lead to the conclusion that the order of the Assessing Officer called for interference and revision.

e) The Commissioner cannot initiate proceedings with a view to start fishing and roving inquiries in matters or orders which are already concluded; that the department cannot be permitted to begin fresh litigation because of new views they entertain on facts or new versions which they present as to what should be the inference or proper inference either of the facts disclosed or the weight of the circumstance; that if this is permitted, litigation would have no end except when legal ingenuity is exhausted.

f) Whether there was application of mind before allowing the expenditure in question has to be seen; that if there was an inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under Sec. 263 merely because he has a different opinion in the matter; that it is only in cases of lack of inquiry that such a course of action would be open; that an assessment order made by the Income Tax Officer cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately; there must be some prima facie material on record to show that the tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation, a lesser tax than what was just, has been imposed.

g) The power of the Commissioner under Sec. 263 (1) is not limited only to the material which was available before the Assessing Officer and, in order to protect the interests of the Revenue, the Commissioner is entitled to examine any other records which are available at the time of examination by him and to take into consideration even those events which arose subsequent to the order of assessment.

Before dealing further with the facts of the case, it needs to be noted that in the present Appeal, the substantial question of law is confined only to the correctness or otherwise of the Tribunal upholding the order of the AO in assuming the profit on the undisclosed turnover. In other

words, to be precise, the item at Serial No.(b) of Para 3 of the order of the Commissioner *i.e.*, Income from trading business (Transactions outside books) estimated @ 10% of the turnover, which comes to Rs.4 lakhs alone is in dispute. A perusal of the order of the Commissioner shows that he has assigned the following reasons for interfering with the order of the AO in the above aspect:

“In the present case, as stated above, a search was conducted by the Department during the course of which certain material was found and also seized, which clearly indicated that the assessee had made undisclosed transactions outside the books of account. From the order of assessment, it is very clear that the assessing officer has not made further enquiries into the search material gathered and the documents seized from the assessee. Although the Assessing Officer has estimated the income at 10% of Rs.40 lakhs, it is not clear as to how the figure of Rs.40 lakhs has been arrived at and on what basis the income was estimated at 10% of the unaccounted turnover. In fact the order does not even explain the basis for allowing Rs.36 lakhs as expenditure out of the unaccounted sales taken at Rs.40 lakhs, thereby taxing the balance of Rs.4 lakhs only. On the other hand, the assessee on 24-10-1997 had admitted unaccounted income of Rs.25 lakhs out of the unaccounted sales, which has also not been taken into account while framing the block assessment. Enquiries have also not been conducted regarding sale of molybdenum outside the books by verification of consignments sent by Insured parcels by writing to the postal department. There was also material available with the

Assessing Officer regarding shares sold by the assessee and his wife, record of valuation of property at 3-6-145/9/A belonging to the assessee at Rs.30.12 lakhs, details of bank accounts of the assessee and his wife, jewellery, etc., which aspects have also not been considered by the Assessing Officer, while framing the block assessment. In fact, the block assessment return has been accepted in toto. The order framed by the A.O. was therefore, erroneous because it is a stereo typed order which simply accepted what the assessee has stated in the block return and the A.O. failed to make enquiries which are called for in the circumstances of the case. [(88 ITR 323(SC) and 67 ITR 84(SC)]. The A.O. has even failed to compute the undisclosed income of the assessee, assessment year-wise by discussing each year's income separately. Telescoping of income has also not been done assessment year-wise. Details of cash and Bank balances added back have also not been discussed. Therefore, neither have the undisclosed investments been discussed by the assessing officer in the assessment order nor the undisclosed income. While estimating the business profit also, the A.O. has not quantified the undisclosed business transactions assessment year wise on which the profits have been estimated. It is also not clear from the assessment order, whether the cost of sales have been accounted for in the books of account or the purchases have been made outside the books of account. The case laws and the Tribunal decisions cited by the A.R. of the assessee are distinguishable on facts and in law. Since the assessment order passed by the A.O. suffers from several infirmities as discussed above, I have reason to believe that the block assessment order passed by the A.O. was both erroneous and prejudicial to the interests of revenue. Therefore, to safeguard the interests of revenue, the block assessment order passed by the A.O. is set

aside for making the assessment *de novo*. 'The A.O. is directed to examine the seized material and other documents and material available with him and frame a fresh assessment in accordance with law after giving a fresh opportunity of hearing to the assessee.'

As evident from the reasons contained in the above reproduced Para, the Commissioner has pointed out that the order of the AO does not explain as to how the figure of Rs.40 lakhs has been arrived at as undisclosed turn over and on what basis, income was estimated at 10% thereof. He has further observed that the order does not even explain the basis for allowing Rs.36 lakhs as expenditure out of the unaccounted sales of Rs.40 lakhs thereby taxing the balance of Rs.4 lakhs only. He has further commented that enquiries have also not been conducted regarding the sale of molybdenum outside the books by verification of consignments sent by insured parcels by writing to the Postal Department.

As held by the Supreme Court in **Malabar Industrial Co. Ltd.**, (1 supra), an order would be termed as erroneous, if the same is based on an incorrect assumption of facts or an incorrect application of law. In our opinion, had the

Commissioner considered any material available on record, which would have improbably the claim of the assessee that out of the turnover of Rs.40 lakhs, he has incurred an expenditure of Rs.36 lakhs, it would have been permissible for him to interfere with the assessment order, for, in such a case, acceptance of the claim of the assessee by the AO could have been termed as based on an incorrect assumption of facts contrary to the record. The Commissioner has not pointed out any such material. In the absence of such material, in our opinion, the Commissioner wanted a further enquiry into the correctness or otherwise of the claim of expenditure, which, totally, falls outside the scope of his jurisdiction under Section 263 of the Act. In other words, it is the order of the Commissioner, which is based on an incorrect assumption that the expenditure might have been exaggerated or bloated up without there being anything on record. The Commissioner has also not rendered a finding that assumption of income at 10% of the undisclosed turnover is contrary to any statutory provisions or settled legal principle. Therefore, it cannot be said that the order of the AO suffers from the defect of an incorrect assumption of fact or an incorrect application of law warranting

interference with it by the Commissioner. On the Contrary, the order of the AO, a copy of which was placed before us by the learned Counsel for the respondent- assessee, categorically shows that the detailed working of the total disclosure made by the group was submitted by the assessee before the Deputy Director of Income Tax and that after verification, he has vetted the same. This finding of fact was not found incorrect by the Commissioner. If, on verification of the detailed working by the (DD80), the AO has accepted the return filed by the assessee, the view taken by him is plausible one.

The law is well settled from the afore-mentioned judgment that where two views are possible, the Commissioner cannot revise the assessment order merely because he does not agree with the view taken by the AO. This is precisely the ground, on which the Tribunal has set aside the order of the Commissioner.

For the afore-mentioned reasons, we answer the substantial questions of law framed by the Revenue against bit.

On the premises as above, the Appeal is dismissed.

(C.V.Nagarjuna Reddy, J)

(T.Amarnath Goud, J)

Date: 03-01-2018

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